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# Quarterly Synopsis of Florida Cases

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# QUARTERLY SYNOPSIS OF FLORIDA CASES\*

The Florida Supreme Court decided about one hundred cases during the period reported from October 1, 1952 through December 4, 1952. Those opinions (excluding memorandum decisions and a few others not considered of sufficient importance to be noted here) found in 60 So.2d 321 to 61 So.2d 248 are herewith reported. In addition one federal case interpretative of Florida law is included. This was the only case found from 72 Sup. Ct. 679 to 73 Sup. Ct. 214\* (advanced sheets from May 15, 1952 through December 15, 1952); 198 F.2d 273 to 199 F.2d 456 (advanced sheets from October 1, 1952 through December 15, 1952); and 106 F. Supp. 1 to 107 F. Supp. 1023 (advanced sheets from September 22, 1952 through December 15, 1952).

**ADMINISTRATIVE LAW.** *Florida Racing Commission: Undesirables.* The Florida Racing Commission does not have broad enough powers to determine with unlimited authority who is an undesirable. A citation issued to one to show cause why action should not be taken to sever his financial interest in Florida race tracks because of his "undesirability" is without warrant or authority of law.<sup>1</sup>

**Power to enjoin.** A claim that the majority of the State Board of Accountancy is prejudiced against the claimant does not disqualify that group from seeking to have the chancery court enjoin the claimant, and therefore a motion to quash a writ of mandamus can be granted.<sup>2</sup>

**BROKERS.** *Suspension: Failure to answer an information.* The Florida Real Estate Commission may suspend a broker without a supporting finding of fact for failure to answer an information specifying a charge. The chairman of the commission may declare the defendant to be in default and the allegations of the information shall be taken as true.<sup>3</sup>

**CARRIERS.** *Certificate to operate.* The lessor of a truck with the owner or an employee of the owner as driver for use by the shipper to transport property in interstate commerce, even though the lessor collects rent on a per diem basis, is deemed to be in a transportation service and is therefore required by law<sup>4</sup> to have authority from either the Utility Commission or the Interstate Commerce Commission.<sup>5</sup>

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\*This issue of the *Quarterly Synopsis* was written by Joseph Manners and edited by Robert Earle Dooley.

1. FLA. STAT. § 550.01 *et seq.* (1951), *Jones v. Kind*, 61 So.2d 188 (Fla. 1952).

2. *State v. Costar*, 60 So.2d 481 (Fla. 1952).

3. FLA. STAT. §§ 475.26, 475.30, 475.31 (1951), *Hime v. Florida Real Estate Comm'n*, 61 So.2d 182 (Fla. 1952).

4. FLA. STAT. § 323.01 *et seq.* (1951).

5. *Bruce's Juices, Inc. v. King*, 61 So.2d 175 (Fla. 1952).

CONSTITUTIONAL LAW. *Search and seizure: Admissibility of evidence.* A search made without a warrant, on mere suspicion, without probable cause, before any arrest has been made, is unlawful and the results of the search are inadmissible in evidence.<sup>6</sup>

*Search and Seizure: Time of search.* A pursuit for the purpose of a search is very much a part of that search so long as the suspected party realizes the reason for the chase.<sup>7</sup> However, where the suspect sees a police officer approach and merely suspects a search and thereby throws out of his car contraband which the same officer finds, the search is only begun from the time of the finding.<sup>8</sup>

*Search and Seizure: Unlawful search.* Halting a car without probable cause, and reaching in and lifting a package in order to look under it, amounts to an unlawful search. "A search must be lawful *in toto* and one that is unlawful *ab initio* is not made lawful by what is found in consequence thereof."<sup>9</sup>

CONTRACTS. *Removal from Statute of Frauds.* Performance of a contract by a son with reference to land and the commencement of a building upon it while the father either approves or stands idly by and observe without objection, removes the oral contract from the Statute of Frauds.<sup>10</sup>

*Substantial performance.* A contract for water proofing outside walls does not include doors and windows which are to be "masked out."<sup>11</sup>

CRIMINAL LAW. *Indictment and information: Defective information.* A directed verdict due to a fatal variance in an information will not preclude the state on the theory of double jeopardy from prosecuting under a corrected second information.<sup>12</sup>

*Procedure: Mercy commutation.* The Supreme Court is not the proper forum in which to seek a mercy commutation. Such jurisdiction lies either with the trial jury or the State Board of Pardons.<sup>13</sup>

DECLARATORY JUDGMENTS. *Subject matter of other litigations.* The legislature, in enacting the statute which admits "... the existence of another adequate remedy shall not preclude a decree, judgment or order for declaratory relief,"<sup>14</sup> did not intend to abrogate the long established rule that a declaratory decree may not be sought while the same issues are pending litigation in another suit.<sup>15</sup>

FLORIDA ELECTIONS. *Ballots: Absentees.* By statute<sup>16</sup> a qualified voter does not have to file a written application for an absentee ballot with the supervisor of registration in order to receive his ballot. Neither must this

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6. *Kraemer v. State*, 60 So.2d 615 (Fla. 1952).

7. *Ford v. City of Jackson*, 153 Miss. 616, 121 So. 278 (1927).

8. *Mitchell v. State*, 60 So.2d 726 (Fla. 1952).

9. *Kraemer v. State*, 60 So.2d 615 (Fla. 1952).

10. *Bernecker v. Bernecker*, 60 So.2d 399 (Fla. 1952).

11. *Twentieth Century Builders Corp. v. Moore*, 61 So.2d 196 (Fla. 1952).

12. *State v. Cootner*, 60 So.2d 734 (Fla. 1952).

13. *Johnson v. State*, 61 So.2d 179 (Fla. 1952).

14. FLA. STAT. § 87.12 (1951).

15. *Taylor v. Cooper*, 60 So.2d 534 (Fla. 1952).

16. FLA. STAT. § 101.62 (1951).

elector make any informal requests containing any of the statutory provisions which permit the casting of an absentee ballot.<sup>17</sup>

*Proper notice.* Informalities or irregularities concerning promulgation of notice of an election shall not render the election invalid where the result was not affected by them.<sup>18</sup>

*Special primary.* It will be the Governor's duty to call a special primary election for the purpose of filling a vacancy in a nomination caused by the death of the political party's nominee.<sup>19</sup> However, where a political party has failed to qualify a person as a candidate for nomination in the regular primary, the Governor may not call a special primary to fill such alleged vacancy in the nomination.<sup>20</sup>

**JUDICIAL ADMINISTRATION.** *Pre-trial conference: Attorney's liability.* Even though counsel is the litigant's agent, it would not be justifiable to dismiss an action with prejudice for failure of counsel to appear for a pre-trial conference, because such a dismissal would punish the litigant and the rule concerning pre-trial conferences<sup>21</sup> is primarily for the governance of counsel.<sup>22</sup>

*Pre-trial conference: Attorney's liability.* Where a pre-trial conference is called at the discretion of the trial court, counsel should treat this request with a great deal of consideration so as to make their appearance almost mandatory. The court has power to discipline counsel for refusal or failure to appear.<sup>23</sup>

**LIENS.** *Subordination agreement.* A subordination agreement, in conjunction with a new lease, making original lessee's interest in the fixtures subordinate to lessor's lien for rent and also releasing the former from liability was valid. The lessor who had elected to act as agent for the new tenants and in this capacity declared all rents due for the unexpired term, as per lease agreement, was entitled to a superior lien for rent on the furniture and fixtures sold on a conditional sale to the tenants by the original lessee.<sup>24</sup>

**MORTGAGES.** *Constructive notice.* A duly recorded divorce decree which transfers title to realty to mortgagor's son, constitutes constructive notice of such transfer to mortgagees. The opinion is strengthened by the fact that the mortgagor was not living on the premises at the time of the purported execution of the mortgage.<sup>25</sup>

**MOTOR VEHICLES.** *Driver's license.* A driver's license may only be revoked on the grounds provided by law; and failure to take an examination,

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17. *Jolley v. Whatley*, 60 So.2d 762 (Fla. 1952).

18. *Willets v. North Bay Village*, 60 So.2d 922 (Fla. 1952).

19. FLA. STAT. § 100.111(2)(c) (1951).

20. *In re Opinion to the Governor*, 60 So.2d 321 (Fla. 1952).

21. FLA. STAT. Common Law Rule 16 (1951).

22. *Beasley v. Girtten*, 61 So.2d 179 (Fla. 1952).

23. *Beasley v. Girtten*, 61 So.2d 179 (Fla. 1952).

24. *Beck v. Snow*, 60 So.2d 624 (Fla. 1952).

25. *First Federal Savings & Loan Ass'n of Miami v. Fisher*, 60 So.2d 496 (Fla. 1952).

as directed by the Department of Public Safety, is not one of the grounds stated in the statute.<sup>26</sup>

*Sale.* Provisions of the statute<sup>27</sup> concerning the sale of motor vehicles by endorsement and transfer of the certificates of title or registration do not intend to provide an exclusive method for the purchase and delivery of an automobile. Title may pass under the common law rules, applying to sales although such was not the effect in the instant case.<sup>28</sup>

*Title.* Title of an automobile remains with a dealer if he allows the prospective customer to use the vehicle over a trial period, and will continue to remain until payment is made even after the buyer, who retains possession, has agreed to purchase.<sup>29</sup>

*MUNICIPAL CORPORATIONS. Bonds: Revenue measure.* Reconstructing, paving and improving city streets is not an undertaking from which a city can derive fees, rentals or other revenues and in order to issue bonds the undertaking must be a revenue measure.<sup>30</sup>

*Certificates of indebtedness.* Certificates of indebtedness to pay the cost of construction of a county jail may be issued in anticipation of a tax authorized by statute.<sup>31</sup>

*Organizing.* Where the statute requires that the persons establishing a municipal government be freeholders and registered voters,<sup>32</sup> the freehold requirement is met by one having a legal or equitable interest in land which does not necessarily have to be registered in the office of the Supervisor of Registration.<sup>33</sup>

*Status.* A town which has been abolished by an act of the legislature has no legal status by which it can become a grantor in a conveyance of real property.<sup>34</sup>

*Taxation.* Pursuant to the Constitution<sup>35</sup> an approving vote of the majority of the freeholders is necessary to levy a tax in order to pay off a bond issue for the construction of a county hospital in the event that funds so allocated fail or become insufficient.<sup>36</sup>

*Tort liability: Notice.* A mere defect in the form or manner of serving notice on a town of a tort committed by one of its employees might be overlooked, but where the town clerk is notified and later refers the plaintiff

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26. FLA. STAT. § 322.22 (1951), *Carnegie v. Department of Public Safety*, 60 So.2d 728 (Fla. 1952).

27. FLA. STAT. § 319.01 *et seq.* (1951).

28. *Ragg v. Hurd*, 60 So.2d 673 (Fla. 1952).

29. *Ibid.*

30. Fla. Sp. Acts 1949, c. 26118 § 1 *et seq.*; *City of Panama v. State*, 60 So.2d 658 (Fla. 1952).

31. FLA. STAT. § 135.01 (1951), *State v. St. Johns County*, 60 So.2d 530 (Fla. 1952).

32. FLA. STAT. § 165.01 (1951).

33. *Town of Coreytown v. State*, 60 So.2d 482 (Fla. 1952).

34. *Anglin v. Lauderdale-By-The-Sea*, 60 So.2d 619 (Fla. 1952).

35. FLA. CONST., ART. IX, § 6.

36. *State v. Florida State Improvement Commission*, 60 So.2d 747 (Fla. 1952).

to the town's liability insurance company adjustor, this is not compliance with the town charter requiring written notice to the town attorney.<sup>37</sup>

**NEGLIGENCE.** *Contributory negligence: Burden of proof.* A plea of contributory negligence admits negligence on the part of the defendant and places him under the burden of proving his plea.<sup>38</sup>

**NEGOTIABLE INSTRUMENTS.** *Countersignatures.* A corporation check which requires a countersignature will not be a valid instrument until so signed. Where this type of check is presented for payment and it only bears the president's signature, the necessary co-maker's signature will make it valid, regardless of the fact that the check was outstanding for one year and that it bore a forged endorsement.<sup>39</sup>

**PARTNERSHIP.** *Profits.* Under a contract in the nature of a partnership whereby a son is to manage a grove, he has a right to a one-half interest in the net profits from the sale of the fruit which are still on the trees at the termination of the contract.<sup>40</sup>

**PROCEDURE.** *Appeal and error: Allowing of amendments.* Even if a lower court should feel that the proffered defenses would not constitute a valid defense, the amendments should be allowed and ruled on so that the record of the case will be complete.<sup>41</sup>

*Appeal and error: Comment by trial judge on evidence.* Only a jury may evaluate and apply evidence unless the court calls for an instructed verdict. The trial court may not comment on the evidence.<sup>42</sup>

*Judgments: Void for lack of jurisdiction.* Where the record in a sister state's proceedings shows on its face that the judgment was confessed under a void warrant of authority the court failed to obtain jurisdiction over the defendant and therefore this judgment cannot be sued upon in Florida.<sup>43</sup>

*Pleadings: Leave to amend.* Giving leave to amend a pleading is a matter within the discretion of the court, but the power of this discretion should not be so exercised as to defeat the right of a litigant. "Leave shall be freely given when justice so requires."<sup>44</sup>

**REAL PROPERTY.** *Adverse possession: Color of title.* A quit-claim deed which conveys the interest of one tenant-in-common will not be sufficient color of title to establish adverse possession as against the interest of the other tenant, notwithstanding that the grantee had assumed all tax obligations.<sup>45</sup>

*Dedications: Proof of acceptance.* The proof of acceptance of the

37. *Town of Miami Springs v. Lasseter*, 60 So.2d 774 (Fla. 1952).

38. *Green v. Atlantic Co.*, 61 So.2d 185 (Fla. 1952).

39. *Block v. Howard Sober, Inc.*, 60 So.2d 538 (Fla. 1952). See note 7 *MIAMI L.Q.*

40. *Bernecker v. Bernecker*, 60 So.2d 399 (Fla. 1952).

41. *Town of Coreytown v. State*, 60 So.2d 482 (Fla. 1952).

42. *Lithgow Funeral Centers v. Loftin*, 60 So.2d 745 (Fla. 1952).

43. *Markham v. Nisbet*, 60 So.2d 393 (Fla. 1952).

44. *FLA. COM. LAW RULE 15*, subsection A; *Town of Coreytown v. State*, 60 So.2d

45. *Cook v. Rochford*, 60 So.2d 531 (Fla. 1952).

public of an offer of dedication must be (1) clear, (2) satisfactory and (3) unequivocal.<sup>46</sup>

**STATUTES. Florida: Death of judgment creditor.** The statute<sup>47</sup> which provides that "the death of either party between the verdict and judgment and the issuing or return of execution shall not be alleged as error" intends that an execution by a judgment creditor who dies before "issuing or return of execution" should be valid.<sup>48</sup>

**Statute of Limitations.** The Florida Statute of Limitations for causes of actions arising out of a state very clearly shows that "when the cause of action has arisen in another state . . . , and by the laws thereof an action cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this state."<sup>49</sup> When the above is read in conjunction with the New York Statute<sup>50</sup> which tolls the Statute of Limitations during the absence of a resident from that state only for actions commenced against the defendant in the State of New York, the defendant's absence after four years did not toll the six year New York Statute of Limitation<sup>51</sup> in a Florida action. However, the general rule is that the limitation of the action is determined by the law of the forum where the action is brought, so where the defendant resided in Florida for more than three years before the commencement of the action, the action was barred by the three year limitation statute of Florida.<sup>52</sup>

**TAXATION. Florida: Municipal.** A tax, establishing a maximum rate to be paid annually, was deemed to be valid and not too vague or indefinite, because the county commissioners could from the amount of the debt to be retired and from the rate maximum adjust the tax annually so that the millage in any one would be neither too large nor too small.<sup>53</sup>

**Florida: Widow's dower.** An act of 1939<sup>54</sup> which made a widow's dower ratably liable for federal estate tax was impliedly repealed by the Apportionment Act of 1949<sup>55</sup> because its enactment closely followed the enactment of the Revenue Act<sup>56</sup> which allowed a deduction for any interest in property passing from the decedent to the surviving spouse.<sup>57</sup>

**USURY. Forfeiture.** In a loan transaction where the debt has been paid and the interest deemed to be usurious, the guilty party, by statute,<sup>58</sup> shall forfeit both principal and interest.<sup>59</sup>

46. *Mumaw v. Roberson*, 60 So.2d 741 (Fla. 1952).

47. FLA. STAT. § 45.16 (1951).

48. *Beitler v. Turner*, 61 So.2d 167 (Fla. 1952).

49. FLA. STAT. § 95.10 (1951).

50. N.Y. CIV. PRACTICE ACT § 19 (1951).

51. N.Y. CIV. PRACTICE ACT § 48 (1951).

52. FLA. STAT. § 95.11(5) (1951), 227 Park Ave. Corp. v. Smyth, 106 F. Supp. 305, (N.D. Fla. 1952).

53. *State v. Sumter County*, 60 So.2d 529 (Fla. 529).

54. Fla. Laws 1939, c. 18999 § 1.

55. FLA. STAT. § 734.041 (1951).

56. INT. REV. CODE § 812(c), 26 U.S.C. (1948).

57. *In re Fuch's Estate*, 60 So.2d 536 (Fla. 1952).

58. FLA. STAT. § 687.07 (1951).

59. *Burket v. Johnson*, 61 So.2d 197 (Fla. 1952).

**WILLS. Gift: *Inter vivos*.** In order for a donee to prevail, the evidence establishing delivery and acceptance necessary for a gift *inter vivos* must be clear and convincing.<sup>60</sup>

**WITNESSES. Adverse party: *Re-examination by opposition*.** If an adverse party testifies and is cross-examined by opposing counsel, this same adverse party may again be called for examination by the opposition providing that questioning be limited to (1) matters alleged in the complaint or (2) matters which were developed at the trial or (3) matters essential to lay a predicate for impeachment. The trial court may require counsel who calls the adverse party to show that the examination is for the purpose of supporting one of the three reasons enumerated above.<sup>61</sup>

**WORKMEN'S COMPENSATION. Compensation for aggravation.** Workmen's compensation may be awarded where an injury aggravates or accelerates the progress of a disease. Compensation depends upon the injury and not the condition of the health of the employee.<sup>62</sup>

**Insurer: *Right of subrogation*.** A compensation insurer has no right of subrogation in the absence of a law or contract. The section of the Workmen's Compensation Act as amended in 1951<sup>63</sup> permits an injured employee to claim compensation benefits and at the same time institute suit against third party tort-feasors within a year after the cause of action has accrued. If, however, the injured employee fails to bring this tort action, the employee or his insurance carrier may institute such suit.<sup>64</sup>

**ZONING. Ordinances: *Conflicting with statute*.** The State Beverage Act of 1935<sup>65</sup> expressly authorized the cities of Florida to establish zoning ordinances restricting the locations for the sale of liquor. In 1939 a general law<sup>66</sup> granted the cities the power to enact zoning ordinances. However, this enactment could not have intended to do away with the zoning restrictions afforded by the State Beverage Act because (1) no general procedure to be followed in adopting these regulations had been prescribed by the legislature and (2) a section of this act<sup>67</sup> expressly provides that "This act shall not be construed to have the effect of repealing, impairing, or modifying any general or special law granting any like or similar powers to any municipality in the State of Florida, but the powers herein granted shall be supplemental and accumulative."<sup>68</sup>

60. *Canova v. Florida National Bank of Jacksonville*, 60 So.2d 627 (Fla. 1952).

61. *FED. R. CIV. P. 43(b)*, *FLA. STAT. Common Law Rule 37* (1951), *Loftin v. Morgenstern*, 60 So.2d 732 (Fla. 1952).

62. *Mobley v. Pasco Packing Co.*, 60 So.2d 662 (Fla. 1952).

63. *FLA. STAT. § 440.39* (1951).

64. *Fidelity & Cas. Co. of New York v. Bedingfield*, 60 So.2d 489 (Fla. 1952). See Note 7 *MIAMI L.Q.* 271 (1953).

65. *FLA. STAT. §§ 168.07, 526.45* (1951).

66. *FLA. STAT. c. 176* (1951).

67. *FLA. STAT. § 176.24* (1951).

68. *Ellis v. City of Winter Haven*, 60 So.2d 620 (Fla. 1952).